Supreme Court, U.S.
FILED
No. D/41921 MAY 22 1995
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1994

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTION PRESENTED

Whether promises to a local government of land, money and improvements, voluntarily made during a rezoning of land that is subsequently taken by the United States, constitute compensable property interests.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 47

APPENDIX ..... 1a.--128a.

TABLE OF AUTHORITIES

Cases — Page

Armstrong v. United States, 364 U.S. 40 (1960) 37

Board of Supervisors of Fairfax County v. Cities Service Oil Co., 213 Va. 359, 193 S.E.2d 1 (1972) 45

Board of Supervisors of Fairfax County v. Medical Structures, Inc., 213 Va. 355, 192 S.E.2d 799 (1972) 44

First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011 (4th Cir. 1981) 20

Greenco Corp. v. City of Virginia Beach, 214 Va. 201, 198 S.E.2d 496 (1973) 43

May v. Dewey, 201 Va. 621, 112 S.E.2d 838 (1960) 42

United States v. 50 Acres of Land, 469 U.S. 24 (1984) 14, 46

United States v. Causby, 328 U.S. 256 (1946) 20

United States v. General Motors Corp., 323 U.S. 373 (1945) 20, 21

United States ex rel T.V.A. v. Powelson, 319 U.S. 266 (1943) 19

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 20

TABLE OF AUTHORITIES------Continued

United States Constitution Page

U.S. Const. Amend V 3

Statutes

16 U.S.C.§§ 429b(b)(2)(A),(B) (1991) 4

Va. U.S.C. §1491 (1989) 9

Va. Code Ann. § 15.1-430 (Michie 1989) 6

Va. Code Ann. § 15.1-478 (Michie 1989) 40

Va. Code Ann. § 15.1-491(a) (Michie 1989) 7, 22, 23, 36

Va. Code Ann. § 15.1-491(a1) (Michie 1989) 24

VA. Code Ann 15.1-491.2 (Michie 1989) 22

VA Code Ann 15.1-491.2:1 (Michie 1989) 22

Va. Code Ann. § 15.1-491(a2) (Michie 1989) 24

Va. Code Ann. § 15.1-491(a3) (Michie 1989) 24

Prince William County Code § 32-700.30 24

IN THE SUPREME COURT
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BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

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v.
UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Board of County Supervisors of Prince William County, Virginia, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. *infra*, 1a-38a) is reported at 48 F.3d 520 (1995). The opinion of the United States Claims Court (App. *infra*, 47a-87a) is reported at 23 Cl. Ct. 205 (1991).

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered judgment in this case on February 21, 1995. This Petition for a Writ of Certiorari was filed within ninety (90) days of February 21, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Manassas National Battlefield Park Amendments of 1988, Title X of the Technical and Miscellaneous Revenue Act of 1988, Pub.L. No. 100-647, 102 Stat. 3342, 3810 (1988), (codified at 16 U.S.C. §§ 429b(b) (1988)). (App. *infra*, 88a-94a).

STATEMENT OF THE CASE

This is a case brought under the Manassas National Battlefield Park Amendments of 1988 (hereinafter the "Act") and the Fifth Amendment of the United States for payment to the Petitioner Board of County Supervisors of Prince William County, a political subdivision of the Commonwealth of Virginia (hereinafter "Petitioner" or "County"), of just compensation for its property interests taken pursuant to the

Act. The Act vested in the United States all right, title and interest, and immediate possession in property known as the "William Center Tract" (hereinafter the "Tract") in order to expand the Manassas National Battlefield Park. The Act provided for just compensation to the owners of *any* property taken, as required by the Fifth Amendment.

In 1986, Hazel-Peterson Company (hereinafter "Hazel") acquired the Tract, consisting of approximately 542 acres, for approximately $9.8 million. The Tract is located in western Prince William County, Virginia. At the time, it adjoined the Manassas National Battlefield Park. It was zoned for agricultural uses and was undeveloped.

Shortly after acquiring the property, Hazel applied to the County for a rezoning to increase the uses to which the land could be put. On November 18, 1986, the County rezoned the property to allow Hazel to build a large commercial and residential development (hereinafter the "Project"). The rezoning was conditioned upon Hazel's voluntary promises to the County to dedicate or convey to the County real and personal property and to devote portions of the Tract to specified uses. These voluntary promises are called "proffers."

"Proffers" are part and parcel of "conditional zoning" in Virginia. Va. Code Ann. § 15.1-430 (Michie 1989). They are reasonable conditions "in

addition to or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance." They are voluntary promises by a landowner when the County considers a request for a rezoning. *Id.* As such, they often include voluntary promises to convey land to the County or promises to the County to dedicate land for certain purposes. The Code of Virginia authorizes Petitioner to accept these voluntary promises as part of the rezoning of the property in question. *See* Va. Code Ann. § 15.1-491(a) (Michie 1989). The specific promises by Hazel to the County were:[1]

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[1] Proffer numbers are taken from the original proffer document. The relevant proffers are set forth in the Appendix hereto. App. *infra*, 116a-126a.

#3 provision of natural and all weather trails;

#6 provision/construction of a community swimming pool/center, 2 tennis courts, 2 multi-purpose courts, multi-purpose ballfield, in specified locations;

#9 construction of William Center Boulevard; dedication of 4.5 acres on request of County and easements for construction of the Route 234 Bypass;

#10 construction of additional east bound and west bound lanes on Route 29 and a northbound lane on Route 234 at Route 234/Route 29 intersection; reconstruction/improvement of Groveton Road; construction of a southbound right turn lane at Route 621/Route 622 intersection; construction of right and left turn deceleration lanes at Route 29; upgrade William Center Boulevard; additional eastbound and westbound lane at Route 621/Route 622;

#14 contribution of $2 million toward construction of the I-66/Route 234 Bypass Interchange; and

> #20 provision of 5 acres for a fire station, commuter parking lot or other public facility.

Soon after Hazel started to construct the Project, the Act brought the Project to a halt and defeated the County's right to the above interests. Finding itself divested of the proffered land, money and recreational facilities, the County joined the other claimants in pursuing the just compensation required by the Act and the Fifth Amendment. The County filed suit in the United States Claims Court(hereinafter the "Trial Court") which had jurisdiction under the Act, the Fifth Amendment and 28 U.S.C. § 1491 (1988) to hear the County's claim for just compensation for the above

proffers as well as easements,[2] and street rights-of-way owned by the County in fee simple.[3] Although the United States ultimately settled with Hazel's successors by paying them *seven* times what Hazel paid for the Tract prior to the County's rezoning (App. *infra*, 127a), the County received nothing for the land, roadways, money and recreational facilities that resulted from the rezoning.

The Trial Court dismissed Petitioner's claim, stating that the proffers were not compensable property

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[2] The County ultimately withdrew its claims for easements.

[3] The United States Court of Appeals for the Federal Circuit agreed with Petitioner that the street rights-of-way owned in fee simple were compensable property interests and remanded that aspect of the litigation back to the Claims Court. Petitioner does not seek review of that portion of the Opinion.

interests under the Act and the Fifth Amendment. *Board of County Supervisors of Prince William County, Virginia v. United States*, 23 Cl. Ct. 205 (1991), App. *infra*, 47a. On appeal, the United States Court of Appeals for the Federal Circuit (hereinafter the "Court of Appeals") agreed with the Trial Court. 48 F.3d 520 (1995), App. infra, 2a. Focusing on what it perceived to be the purpose of the proffers, the Court of Appeals rejected the County's arguments that the proffers conferred on it rights sufficiently analogous to other compensable property rights to merit compensation under the Act. This Petition followed.

REASONS FOR GRANTING WRIT

Pursuant to Sup.Ct.R. 10.1(c), this Court should grant this Petition to review an important question of Federal law which has not, but should be, settled by the Court, *to wit*, whether "proffers" are compensable property interests under the Act and the Fifth Amendment. The opinions of the Trial Court and the Court of Appeals confirm that there is no law on this precise question anywhere in American jurisprudence. Proffers are an integral component of "conditional zoning"[4] which, as the Court of Appeals found, have been expressly authorized by the Virginia legislature. 48 F.3d at 524, App. *infra*, at 14a-15a. The result is

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[4] *See* pages 6-7, *supra*.

that many parcels of land throughout the Commonwealth are encumbered by proffers. In addition, the Act expressly required that *all* property interests be compensated. Thus, whether or not the proffers, voluntarily donated pursuant to conditional zoning, are property interests under the Act and Fifth Amendment should be settled by this Court. The question will reoccur anytime the Federal Government takes property that is encumbered with proffers.

In spite of the broad view that state and Federal courts have of property rights, the instant lower courts determined that the County's future interests were not within that broad category. The reasons given by

the Trial Court and the Court of Appeals run afoul of this Court's admonition in *United States v. 50 Acres of Land*, 469 U.S. 24 (1984), that public property owners should not be treated differently because of the different manner or context in which they acquire interests in property. By hearing this case, the Court would provide guidance to the lower courts on whether public property owners should be compensated differently under the Act or, more generally, the Fifth Amendment solely because of their status.[5]

Allowing the Court of Appeals' decision to stand will also justify other Federal courts in ignoring, in

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[5] Because of their nature, public bodies acquire property in a variety of ways and contexts that often differ from private landowners.

their analysis of takings, the law of the state in which the asserted property interest exists. The substance of what is compensable would be decided by application of fuzzy principles of economics, rather than what the highest state court had to say about what is property in that particular state. This would be particularly disturbing in a state like the Commonwealth of Virginia, whose common law is the oldest in the country and most closely tied to our English Common Law heritage.

1. If Unreviewed, the Court of Appeals' Decision Will Eviscerate the Long-Standing Rule that "Property" is Defined Broadly with Reference to State Law

The Court of Appeals properly framed the issue before it as "whether the County's right to enforce the

provisions of the proffer partake of the nature of those interests called 'property' for which compensation is due." 48 F.3d at 524, App. *infra*, 18a-19a. It also properly recognized that property can be said

> to encompass virtually any relationship among persons with regard to the "things" of the external world. And indeed, as every first year law student learns, property rights have been accorded with regard to a variety of things, ranging from intangibles such as corporate stock, poems, and the gathering of news, to wild animals, flowing water, pieces of outer-space waste, a lost brooch on a window sill, and dead bodies, and even to government benefits.

id., (footnote omitted) quoting Jesse Dukeminier and James E. Krier, *Property* 1-190 (3d ed. 1993); John E. Cribbet, Corwin W. Johnson, Roger W. Findley, Ernest E. Smith, *Property* 1-165, esp. c.

1 "What is Property" (6th ed. 1990); Sheldon F. Kurtz and Herbert Hovenkamp, *American Property Law* 1-44 (2d ed. 1993). *See also Goldberg v. Kelly*, 397 U.S. 254, (1970); *Lynch v. United States*, 292 U.S. 571 (1934).

Citing the need for the law to "draw lines," however, the Court of Appeals concluded that the proffers were not within the broad category of things that are regarded as property. 48 F.3d at 525, App. *infra*, 20a-24a. The reasons given by the Court of Appeals for drawing the lines to exclude proffers were: (1) that the "purpose" or "object" of the proffers was "not to give the County something of intrinsic value with which it could go into the market place and trade, or which it

could use and possess for County purposes"; (2) that "no title to any of these amenities and facilities passed to the County" or "were to be County property"; and (3) that there was nothing in the proffer document to suggest the amenities and facilities "were to be available to the County for its purposes apart from the need to meet the additional concerns caused by the developer's proposal itself."[6] *Id.* The Court of Appeals cited *no* case law in support of the reasons it gave for the placement of its "lines," but appears to

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[6] In footnote 11 of its opinion, the Court of Appeals noted that the five (5) acre fire station site might constitute an exception to this observation, but it was unclear whether title had been transferred to the County prior to the taking. The Court of Appeals gave the trial court permission to "sort this out," if asked on remand. As discussed, *infra*, actual transfer of title is irrelevant to analogous property interests such as materialman liens, restrictive covenants and future interests.

have decided that the novelty of the question required it to "make" new law according to dated and oblique economic concepts about "increased internalization." *See id.* 525 nn.9-10. If new Federal law is to be made about what constitutes a compensable property interest, it should be the doing of this Court, using the guideposts provided by existing, relevant case law.

a. State and Other Case Law Should Have Been Consulted

In making new Federal law, the Court of Appeals should have utilized guideposts in relevant state law. This Court has held that state law must be referenced in determining the meaning of "property" for the purposes of Federal takings. *See United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 279

(1943); *United States v. Causby*, 328 U.S. 256, 266 (1946); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In the instant case, the law of the Commonwealth of Virginia should have been consulted in analyzing whether proffers are interests in property. Federal courts applying Virginia law follow this Court's rule in *United States v. General Motors*, 323 U.S. 373, 378 (1945), stating that a property interest includes not only traditional notions of real and personal property, but extends to benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings. *First Charter Land Corp. v. Fitzgerald*, 643 F.2d 1011, 1014-1015 (4th Cir.

1981). In *General Motors*, this Court held that the Constitutional requirement of just compensation "is addressed to *every sort of interest* the citizen may possess." 323 U.S. at 378 (emphasis added). This Court should grant certiorari to provide guidance on whether conditional zoning proffers are within the wide range of interests this Court has determined to be compensable property interests.

b. Virginia Statutory Law Should Have Been Consulted

The focus of the Court of Appeals on the purpose for which property interests are created, and the result of that mechanism, also led it to discount the significance of proffers running with the land. Once created, the Virginia statutes are clear that

proffers follow the property. Several Virginia statutes authorize localities to accept proffers or conditions in conjunction with rezonings. *See* Va. Code Ann. §§ 15.1-491(a), 15.1-491.2 and 15.1-491.2:1, App. *infra*, 95a.[7] The legislative provisions, which govern conditional zoning in Prince William County, are contained in § 15.1-491(a).[8] App. *infra*, 95a .

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[7] Unless otherwise noted, all statutory references are to the Virginia Code Annotated.

[8] § 15.1-491(a) sets forth those localities which may utilize its enabling authority with respect to proffered rezonings. Prince William County is included by reference in the statute because it is a county with the county executive form of government contiguous to Fairfax County which is a county with the urban county executive form of government. This is colloquially known as "old" conditional zoning, because it was the first enabling authority enacted. It is the most liberal of the provisions relating to conditional zoning in the Virginia Code.

§ 15.1-491(a) gives the County the power and authority to adopt reasonable conditions as part of an amendment to the zoning map, in addition to the regulations provided for in the zoning district by ordinance. The pertinent parts of this critical section are set out below:

> ... for the adoption, in counties..., wherein the urban county executive form of government is in effect, or in a...county contiguous to any such county...as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for in the zoning district by the ordinance, when such conditions shall have been proffered in writing, ... by the owner of the property which is the subject of the proposed zoning map amendment. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property

> covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

App. *infra*, 95a-97a.[9] The flexibility in zoning, provided by the concept of conditional zoning in Virginia, supports the conclusion that property interests in the proffers inure to the local government from the zoning.[10] This statutory provision makes proffers like other property interests that also run with the land. Like materialman liens,

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[9] § 32-700.30 of the Prince William County Code is the local implementing ordinance. App. *infra*, 111a.

[10] In 1990, the Virginia General Assembly recognized the substantial property interests or investments by landowners in proffered rezonings and accorded greater protection to them from future changes in zoning by the governing body even when no rights had otherwise vested under Virginia common law. *See* Va. Code Ann. §§ 15.1-491 (a1), (a2), & (a3) App. *infra*, 95-107a.

for example, proffers attach to the underlying property, and are, by that attachment, in the nature of property interests. A rezoning secures the proffers, which become and remain part of the land. If the Court of Appeals is to "draw lines," it must do so according to relevant concerns such as whether an interest becomes an integral part of a piece of property, not *non-sequitors* such as how a particular property interest was created.

With its rezoning in 1986, the William Center Tract became subject to the proffered conditions attendant to that rezoning of the property. There is no debate that these proffers were extant at the time of the Congressional taking in 1988. The proffers were,

therefore, a part of the property for which the County should have been compensated.

2. If Unreviewed, the Court of Appeals' Decision Will Result in Different Treatment of Public Property Owners Under the Fifth Amendment.

The Court of Appeals properly framed the issue as "whether the County's right to enforce the provisions of the proffers partake of the nature of those interests called 'property' for which compensation is due." 48 F.3d at 524, App. *infra*, 18a-19a. The Court of Appeals erred, however, in focusing on the reason or purpose that the County acquired its property interests. Citing an old economics journal and the need "to draw lines" between property interests and other interests, it

determined, without *any* case or statutory authority, that proffers were not property interests. If the Court of Appeals ruling were allowed to stand unreviewed by this Court, lower courts will decide a public entity's entitlement to compensation on the basis of the peculiar nature *of the property owner* rather than the characteristics of the interests held by it. This is contrary to the fundamental constitutional principle that the status of a property owner should not decide its right to compensation. If unreviewed, the Court of Appeals' decision will provide foundation for a new line of cases that hold that the purpose or object of the property owner in acquiring property is relevant, or

even determinative, as to whether he, she or it owns a property interest.

The purpose or object for which something is acquired does not change the nature of the thing. Yet, both the Court of Appeals and the Trial Court disagreed with the County's contention that the properly accepted proffers conferred on the citizenry of Prince William County certain rights and benefits which constitute property. Neither of the lower courts questioned the rezoning itself or the process by which the County rezoned the Tract. Indeed, the Court of Appeals recognized that Prince William County was authorized to accept proffers. 48 F.3d at 524, App. *infra*, 14a-15a. The lower courts also did not question the

reasonableness of the proffered conditions. Instead, they focused on what they found to be the purpose of the proffers. The Trial Court determined that acceptance of the proffers by the County resulted in legislative amendments which could not constitute property interests. 23 Cl. Ct. at 209, App. *infra*, 63a.[11] Similarly, the Court of Appeals found that the proffers could not be property interests because their "purpose" or "object" was "to commit the developer to undertake his project with

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[11] This finding and resultant conclusion is particularly disturbing since the United States acquired all "right, title and interest" in and to the subject property by a legislative act. Applying the lower court's logic to the Act, for instance, the argument would be that the United States acquired no property interests in the Hazel property because it acquired the Land for the purpose of saving the Manassas National Battlefield through its legislative authority, and it could not bargain that legislative authority away. The United States would reject such an argument as absurd.

a specified degree of concern for and responsibility toward the surrounds and the people who in future years would live and work there." 48 F.3d at 525, App. *infra*, 21a-22a.

By their very nature, local governments are concerned with the well-being of their citizens. Unlike private property owners, value is conferred upon a county when benefits are conferred on its citizens. In addition, the legislative process, by which conditions are imposed, should not militate against regarding the *product* of that process as an interest in property. Counties can act only through legislative processes. In focusing on the "purpose" or "object" of the proffers from the perspective of a private property owner, the Court of

Appeals decided compensabitity of proffers based on the inherent characteristics of governmental entities rather than the value of the interest gained *from the perspective of a government*. The consequence is fodder for future denials of compensation to all public landowners. The Court should grant the writ to protect public landowners from such an unfair result.

3. If Unreviewed, the Court of Appeals' Decision Can Serve to Deprive Public Landowners of the Benefits of their Legislative Acts.

In this case the County acquired a property interest by a legislative act. The settlements, which the United States reached with the other entities owning property interests in the Tract, indicate that substantial consideration was given to the rezoning of the

property, and that the successors to Hazel realized a significant monetary benefit from the rezoning. *See* 48 F. 3d at 523, App. *infra*, 9a. In 1990, the United States settled with NV Homes, *et al.* for a portion of the property in the amount of $34.1 million, plus interest, almost *five* times the price paid by the condemnees in 1986. (Federal Claims Court Docket Entry, Dec. 3, 1990, Exhibit K). In 1990, the United States also reached a settlement, approved by the Claims Court, with Perch, *et al.* for $67,630,000, plus interest, again, at a value *seven* times the $9.8 million purchase price Hazel paid before the Tract's rezoning. *App. infra*, 127a.

Conversely, but for the rezoning by the County, the appraisal of the subject

property would be based on much less valuable uses ("A-1" Agricultural) and the private landowners would have been awarded substantially less. This, alone, presents a compelling reason for holding the United States liable to the County for the value of the proffers attendant to that rezoning.

The events surrounding the specific proffer of five (5) acres of land for a public facility site are illustrative of how the County has been deprived of the benefit of its legislative act of rezoning the Tract. Through its legislative processes, the County gained the 5-acre site dedication. Hazel's successor was paid the increased value of this tangible property interest by the U.S. government even though Hazel

had committed, through the rezoning process, to dedicate it to County uses.[12] Hazel's compensation from the United States included the value of the 5-acre site. Yet the United States refused to pay the County anything for it.[13]

4. If Unreviewed, the Court of Appeals' Decision Will Serve to Deny Compensation to Public Entities Because They Do Not Hold Title at the Time of the Take

a. Owners of Liens and Restrictive Covenants Would Be Denied Just Compensation

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[12] The United States assured the Trial Court, when the Trial Court considered the order approving the settlement orders with the private property owners, that it would not later argue that to compensate the County's property interest in the 5-acre tract or other interests claimed would be double payment. Based on that representation, the Trial Court entered settlement orders before hearing the County's claim.

[13] That the County did not have present physical possession of the five (5) acres at the time of the take is beside the point. As set forth below, there are many sorts of property interests that entitle their owners to future, not present, possession.

The rationale of the Court of Appeals can be used to deny compensation to both public and private possessors of less than complete property rights with present rights of possession. The Court of Appeals determined that the proffers did not create property interests, in part, because

> …no title to any of these amenities and facilities passed to the County. There is nothing in the document of proffers that suggests these were to be County property or that they were to be available to the County for its purposes apart from the need to meet the additional concerns caused by the developer's proposal itself.

525 F.3d at 525, App. *infra*, 22a.

More particularly, as stated at footnote 6, herein, the Court of Appeals noted that the proffer for five (5)

acres, to be set aside for a fire station and other uses, might be property if title to the site was transferred to the County prior to the taking. *Id.* at 525 & n.11. The Court's rationale in requiring the actual transfer of title *prior to the take* is a dangerous precedent for property owners. Courts can be expected to seize upon this test to deny compensation to both public and private owners of future interests in property. The test will also be used to deny compensation to lienholders and those who enjoy the protection of restrictive covenants.

As argued above, § 15.1-491(a) creates a property interest that runs with the property to which it attaches. The interest created is analogous to

other interests that are clearly property. They are sufficiently analogous to materialman liens for their possessor to be entitled to compensation for their taking. In *Armstrong v. United States*, 364 U.S. 40 (1960), this Court upheld the right of materialmen to collect the value of liens on vessels taken by the Federal government even though the liens had not been recorded before the taking. Significantly, the lower court noted that the liens attached by operation of law. Proffers, like materialman liens, attach directly to the underlying property and should, therefore, be the subject of compensation.

Proffers also sometimes confer upon their holders the benefit of restricting

activities on the property. This benefit is indistinguishable, in terms of *interest*, from the benefit conferred upon the benefactors of restrictive covenants. The proffers that all-weather trails and certain recreational facilities be provided in certain locations equate to covenants that those areas not be used in any other fashion. Possession of the ability to restrict the use of another's property is a valuable right, even though title to the property so restricted might never be transferred.

The similarity between proffers on the one hand and materialman liens and restrictive covenants on the other dictates that the Court of Appeals should have placed proffers on the same

side of the "line" as materialman liens and restrictive covenants.

b. Owners of Future Interests Would be Denied Compensation

The Court of Appeals was simply wrong when it observed that: (1) no title had been transferred and (2) nothing else in the proffer document indicated that the proffers were to be County property. *See* 48 F.3d at 525, App. *infra*, 22a. Proffer Number 14, for example, absolutely required the developer to convey $2 million on the occurrence of certain events. *See* App. *infra*, 122a. In this respect, the County's interest is analogous to a future interest in that substantial figure. The County would have received the money if the contingent events had not been made impossible by the

Congressional taking. Proffer Number 9 clearly states that title to 4.5 acres of right-of-way would be County property. The developer committed to dedicate the property any time prior to final subdivision approval that the County requested it. *See* App. *infra*, 118a. Perhaps the Court of Appeals balked from finding the County had a future interest because of the term "dedicate" instead of "convey." *See id.* If so, it is ironic that, in the same opinion, the Court of Appeals found certain street rights-of-way, dedicated according to the usual statutory procedure, to have been conveyed in fee simple absolute as provided by Virginia Code § 15.1-478. *See* App. *infra*, 108a. The effect of the statutory dedication

procedure in Virginia is to convey interests in fee simple. 48 F.3d at 527, App. *infra*, 35a-36a. Therefore, the Court of Appeals erred in not also recognizing that the effect of Proffer 9 was that the 4.5 acres of dedicated right-of-way was to be County property.

Aside from the consequences of statutory dedication, the Court of Appeals' decision ignores that Hazel's offer, and Petitioner's subsequent acceptance of the proffers in conjunction with the rezoning, constituted a valid common law dedication which created a property interest in the Petitioner. In this case, the dedication was complete upon the rezoning and acceptance of the proffers. In Virginia common law,

dedication may be accomplished by any means through which intent to dedicate is made manifest. *May v. Dewey*, 201 Va. 621, 112 S.E.2d 838 (1960). In this case, the offer to dedicate and subsequent acceptance of the proffers by the County in granting the rezoning clearly represented the unequivocal acts necessary to effect a valid dedication. There was no remaining substantive requirement necessary to effect a valid dedication under Virginia law except to transfer possession. That transfer of possession had not occurred at the time of the taking does not abrogate the fact that a valid dedication took place at the time of the rezoning.

Furthermore, the dedication made became irrevocable. In Virginia,

dedications are irrevocable once made. *See Greenco Corp. v. City of Virginia Beach*, 214 Va. 201, 198 S.E.2d 496 (1973). A dedication is not voided just because one of the parties has the power to change the circumstances of that dedication at some future time. *Id.* Therefore, the dedication that was accomplished is not rendered meaningless because the County could later rezone the property.

In this particular case, moreover, the work, which had been performed on the Tract, rendered the County unable unilaterally to rezone it at the time of the taking. As argued before the Court of Appeals, the County took no action to modify the rezoning between the date of the rezoning in 1986 and the 1988 taking

by Congress. More important, the level of development of the Tract, completed at the time of the taking, was such that the developer had a right to proceed to completion, and was not subject to zoning changes the County might have enacted later. Under Virginia law, this is called having a "vested right" in the ability to proceed with the approved plans notwithstanding subsequent changes in government regulation. Two specific Virginia Supreme Court cases deal with vested rights and support the conclusion that Hazel and its successors had a vested right to continue with its project rendering the County unable to unilaterally rezone the Tract. *See Board of Supervisors of Fairfax County v. Medical Structures*, 213 Va. 355, 192

S.E.2d 799 (1972); *Board of Supervisors of Fairfax County v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972). If, as the above cases dictate, the owners' interest in the zoning of the tract vested, the Petitioner's ability to enforce the proffers given to it also matured at the same time. The Petitioner's vested interest constitutes a property interest for which it is entitled to just compensation. The Court of Appeals erred in holding to the contrary.

In sum, the Court should grant this petition to provide guidance on a subject that is likely to reoccur anytime the Federal Government takes property that is encumbered with proffers. It should advise lower courts

whether its ruling in *United States v. 50 Acres of Land, supra,* applies to prevent different treatment of public entities (from that accorded to private landowners who receive substantial compensation) because of the peculiar manner in which public entities acquire and use property. The Court should stem the development of a body of Federal law that that can serve to deprive all local and state governments of compensation when they acquire property through legislative acts or are constrained, by the nature of those legislative acts, from trading those interests in the marketplace. Finally, it should grant this petition to provide guidance on whether a local government's right to compensation should be decided with

respect to state law or what the Court of Appeals referred to as "increased internalization."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1995

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

Petitioner,
v.
UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I, Gifford R. Hampshire, a member of the Bar of this court, hereby certify that on this 22nd day of May, 1995, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class, postage prepaid, to:

1. Jacques B. Gelin, Appellate Section, Environment and Natural Resources Division, P.O. Box 23795, L'Enfant Plaza Station, Washington, D.C. 20026 (202) 514-2762 Counsel of Record for Respondent,

2. The Solicitor General, Department of Justice, Washington, D.C. 20530 (202) 514-2000

3. Allan Brenner, Esq. U.S. Department of Justice, General Litigation Section, Environment & Natural Resources Division, U.S. Department of Justice, 601 Pennsylvania Avenue, N.W., Room 847 Washington, D.C. 20004-0663 (202) 272-6280. Counsel for U.S. Department of Justice and, by courtesy, as Counsel for Respondent below.

I further certify that all parties required to be served have been served.

G. R. Hampshire

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